Supreme Court, U.S.
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(4)

No. 09-495

IN THE
Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, ET AL.,
Petitioners

v.

SIERRA CLUB, ET AL.,
Respondents

On Petition for Writ of Certiorari
to the United States Court Of Appeals for the
District of Columbia Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in the petition – although not raised by any party before the D.C. Circuit panel or in petitioners' request for en banc review, nor addressed by that court – is whether, consistent with the Clean Air Act's judicial review provisions, a regulatory provision adopted under the Act may be reopened for public comment and judicial review when the Environmental Protection Agency subsequently rescinds express limits on that provision's operation, thereby materially altering its operation and significantly increasing its adverse impacts on affected parties.

RULE 29.6 DISCLOSURE

Respondents Sierra Club, Friends of Hudson, Environmental Integrity Project, Louisiana Environmental Action Network, and Coalition For A Safe Environment neither have parent corporations nor have they issued shares to the public or any publicly held company.

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STATEMENT

In the decision below, the D.C. Circuit applied longstanding and unbroken precedent to find that the United States Environmental Protection Agency (EPA or "the agency") had reopened a sweeping regulatory exemption from Clean Air Act controls on emissions of hazardous air pollutants to renewed public comment and to judicial review under Clean Air Act § 307(b), 42 U.S.C. § 7607(b), by subsequently retracting inextricably linked regulatory requirements that EPA had promulgated for the express purpose of limiting that exemption. Pet. App. at 9a-13a. The Court then held that the exemption is contrary to the plain text of the Act. *Id.* at 13a-17a. EPA agreed below that the reopening decision was consistent with D.C. Circuit precedent (EPA Response to Reh'g Petition at 5), does not seek further review of the decision, and has already undertaken to correct the flaws identified by the Court's opinion (July 22, 2009 Letter to Counsel from Adam M. Kushner, Director, EPA Office of Civil Enforcement, available at http://www.epa.gov/compliance/civil/caa/ssm-memo080409.pdf ("EPA Letter") at 4).

Although EPA did not seek further review of the opinion, some of the industry groups who were intervenors below (collectively, "American Chemistry Council" or "ACC"), have petitioned for certiorari to advance an argument that no party raised, is contrary to the position they took in the proceedings below (including their unsuccessful petition for rehearing en banc), and that the D.C. Circuit has never addressed. Although ACC does not challenge

the D.C. Circuit's ruling that the disputed exemption was unlawful, or dispute that Clean Air Act regulatory provisions can be reopened for judicial review, ACC now argues that a regulatory provision can never be reopened by an agency's subsequent changes to interrelated regulatory provisions no matter how inextricably linked those provisions are. But because ACC does not dispute that Clean Air Act rules can be reopened for judicial review, and because decisions about whether any given rule has been reopened necessarily turn on case-specific, particularized analysis of the administrative record, ACC's new contention would not warrant review by this Court even if it had been raised and ruled upon in the D.C. Circuit. Moreover, contrary to ACC's claims, the decision below is fully consistent with D.C. Circuit precedent, does not conflict with any decision in any other court, and readily comports with the Clean Air Act's judicial review provisions. There is no basis for further review.

A. Administrative History

1. Section 112 Emission Standards For Air Toxics

Hazardous air pollutants, also known as "air toxics," are pollutants that can cause cancer and other serious adverse health effects. S. Rep. No. 228, 101st Cong., 1st Sess. 128 (1989). The air toxics provisions in the pre-1990 Clean Air Act (CAA or "the Act") relied largely on EPA discretion, and "worked poorly." *National Lime Ass'n v. EPA*, 233 F.3d 625, 634 (D.C. Cir. 2000). Accordingly, Congress completely rewrote § 112 in the 1990 Clean Air Act Amendments, "eliminating much of EPA's

discretion in the process." *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008), *cert. dismissed* 129 S. Ct. 1313 (2009) and *cert. denied sub nom. Utility Air Regulatory Group v. New Jersey*, 129 S. Ct. 1308 (2009). Section 112 now requires EPA to set emission standards for each hazardous air pollutant that a regulated industry emits and precisely prescribes the stringency for these standards. *Sierra Club v. EPA*, 479 F.3d 875, 877 (D.C. Cir. 2007). Consistent with the special health risks associated with air toxics, the statute provides that standards to control emissions from new or existing sources "shall require the maximum degree of reduction in emissions" that the Administrator finds to be achievable for the source category in question, and may not be less stringent than the emission limitation actually achieved by the best performing sources. 42 U.S.C. § 7412(d)(2)-(3). The Act requires that all Clean Air Act emission standards apply "on a continuous basis." 42 U.S.C. § 7602(k). *See* Pet. App. at 2a-3a.

2. EPA's SSM Exemption

This case involves a broad administrative exemption from statutorily required hazardous air pollutant emission standards. During periods of startup, shutdown, or malfunction (SSM), the exemption at issue excused the operators of major sources of hazardous air pollutants from complying with § 112 emission standards and allowed them to comply instead with only a "general duty" to operate "in a manner consistent with safety and good air pollution control practices for minimizing emissions." 40 C.F.R. § 63.6(e)(1)(i).

When EPA established the SSM exemption in 1994, the agency recognized that allowing sources to comply only with the "general duty" during SSM events would create a "blanket exemption" from § 112 emission standards. Pet. App. at 4a. To prevent that outcome, EPA simultaneously promulgated a robust and detailed set of requirements for "SSM plans." *Id.* Contrary to ACC's claim (Pet. at 6), these were not mere recordkeeping requirements. Rather, the final rule expressly required each SSM plan to set out source-specific "procedures for operating and maintaining the source during periods of [SSM]" and a source-specific "program of corrective action for malfunctioning process and air pollution control equipment used to comply with the relevant standards." 40 C.F.R. § 63.6(e)(3)(i) (1994), C.A. JA927. Source operators had to comply with their plans during SSM events, and the SSM plan elements – including the operation and maintenance procedures and the corrective action program – were binding requirements that were directly and independently enforceable. *Id.* § 63.6(e)(1)(ii)-(iii) (1994), C.A. JA927. *See* Pet. App. at 5a, 10a. Because SSM plans were incorporated into sources' operating permits (required under CAA Title V, 42 U.S.C. § 7661), they had to be reviewed for adequacy and approved by State permitting authorities. Pet. App. at 5a, 10a. The public could comment on SSM plans before they were approved, EPA could require inadequate plans to be revised, and the public could challenge the approval of inadequate plans in court. *Id.* After approval, the SSM plans were unconditionally available to the public which – like EPA or State permitting authorities – could use

them to evaluate whether specific exceedances of emission standards were or were not actually caused by SSM events and to assess and support enforcement measures. *Id.*

EPA described the combination of the general duty and the SSM plan requirements as "a reasonable bridge between the difficulty associated with determining compliance with emission standards during [SSM] events and a blanket exemption from emission limits" (59 Fed. Reg. 12408, 12423 (March 16, 1994), C.A. JA148), and stated that the "purpose" of the plan requirements was to "ensure" that facility owners abide by the general duty, *id.* at 12439, C.A. JA164).

The record showed that major sources of hazardous air pollutants routinely operate subject to the SSM exemption and the general duty rather than CAA § 112 emission standards and that, during such operations, they emit toxic pollution in quantities that vastly exceed their emission limits. SC Br. at 3-5 (citing administrative record). It further showed that the air toxics emitted during these exempted periods have severe adverse effects on health and welfare in communities across America. *Id.* at 5-8. *See also, e.g.*, C.A. JA937-953. Neither EPA nor ACC disputed these facts.

3. EPA's Elimination Of The Regulatory Constraints Promulgated To Contain The SSM Exemption

From 2002 to 2006, EPA revised the regulations containing the SSM exemption three times, *see* Pet. App. at 5a-7a. Contrary to ACC's claim (Pet. at 9),

the agency's revisions did not merely dispose of Title V review for SSM plans. EPA went so far as to retract the requirement that sources actually comply with their SSM plans, rendering the plans – which were the only specific emission control requirements of any kind that applied during SSM events – purely voluntary and unenforceable. Pet. App. at 10a. The agency also eliminated the requirement that SSM plans be incorporated by reference into Title V permits, the opportunity for EPA to require revisions to inadequate plans, and the opportunities for the public to comment on SSM plans and to challenge the approval of inadequate plans in court. *Id.* In addition, EPA eliminated the requirement that SSM plans be available for public review, instead allowing them to be revised in secret and kept secret on plant premises. *Id.* *See* SC Br. at 14-17, 29-30 (summarizing and citing provisions); SC Reply at 11 (same). As the Court found below, "these [were] not mere 'minor changes.'" Pet. App. at 10a (*quoting Envtl. Def. v. EPA*, 467 F.3d 1329, 1333 (D.C. Cir. 2006)). EPA had "'completely changed the regulatory context for its SSM exemption by stripping out virtually all the SSM plan requirements that it created to contain the exemption.'" *Id.* (*quoting* SC Br. at 29) (emphasis in original).

Throughout the rulemaking process, EPA received repeated comments from petitioners in the case below (collectively "Sierra Club") that both its changes to the SSM plan requirements and the underlying SSM exemption were unlawful. Sierra Club, June 4, 2002 Reconsideration Petition at 8, C.A. JA457; Environmental Integrity Project, *et al.* September 12, 2005 Comments at 2-7, C.A. JA463-

468. Sierra Club filed timely petitions for review of all three rules revising the SSM regulations under Clean Air Act § 307(b) and, because each rule contained changes that EPA had not proposed, Sierra Club also filed administrative petitions for reconsideration under § 307(d)(7)(b), 42 U.S.C. § 7607(d)(7)(B).

B. Proceedings Below

Sierra Club argued below that EPA reopened the SSM exemption by rescinding the SSM plan requirements that the agency had promulgated expressly to prevent it from becoming a blanket exemption from emission standards, SC Br. at 29-30, relying on longstanding D.C. Circuit precedent recognizing that agencies can effectively change an existing regulatory provision by changing closely interrelated provisions. *E.g., Kennecott Utah Copper v. United States Department of Interior*, 88 F.3d at 1191, 1214, 1227 (D.C. Cir. 1996). The panel concluded that EPA's progressive stripping of the regulatory constraints that the agency had originally placed on the SSM exemption and "general duty" fit within this doctrine, which the court refers to as "constructive" reopening. Pet. App. at 9a-13a. In particular, the court explained:

> EPA's modifications to the SSM plan requirements created a different regulatory construct as to the means of measuring compliance with the general duty. Because the general duty does not include any "numerical emission limits," 42 Fed. Reg. at 57125, the general duty assumes new shape depending on the means used to capture that standard. In

> 1994, EPA determined that compliance with the general duty on its own was insufficient to prevent the exemption from becoming a "blanket" exemption. It established the SSM plan requirements precisely because the general duty was inadequate. Now EPA has removed these necessary safeguards. Because the general duty was defined in 1994 through and housed in the four walls of the SSM plan requirements, EPA's modifications to those requirements have eliminated the only effective constraints that EPA originally placed on the SSM exemption.

Id. at 10a-11a.[1]

On the merits, the D.C. Circuit found the SSM exemption contrary to unambiguous statutory intent and therefore unlawful under "Step 1" of the analysis required by *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984). Pet. App. at 13a-17a. It held that Clean Air Act § 112 and § 302(k), read together, "require[] that there must be continuous section 112-compliant standards" and that the "general duty" is not a § 112 standard of any kind. *Id.* at 15a.[2] The

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[1] The dissent below also recognized constructive reopening but found it inapplicable on these facts. Pet. App. at 18a-19a.

[2] Contrary to ACC's claim, the D.C. Circuit neither based its merits ruling exclusively on EPA's admission that the general duty is not a § 112 emission standard (Pet. at 3, 11), nor allowed EPA to use an admission in court to "reverse a well-settled rule without any administrative process or notice to interested parties" (*id.* at 23). The D.C. Circuit independently found that the general duty is not an emission standard, and merely noted that EPA had "[a]dmitt[ed] as much." Pet. App. at 15a.

D.C. Circuit concluded that "[b]ecause the general duty is the only standard that applies during SSM events – and accordingly no section 112 standard governs these events – the SSM exemption violates the CAA's requirement that some section 112 standard apply continuously." *Id.* [3]

Following the D.C. Circuit's decision, ACC petitioned for rehearing and rehearing en banc. Nowhere did ACC argue that the doctrine of constructive reopening was contrary to the statute or otherwise impermissible. To the contrary, ACC acknowledged that Sierra Club "could bring their challenge" if the SSM exemption was constructively reopened, and merely claimed that the Club had not satisfied the criteria established in D.C. Circuit

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[3] Without actually claiming the SSM exemption was lawful, ACC implies that it was not truly defective and that EPA might have obtained a different result in court if the agency had the opportunity to address comments on the SSM exemption and develop a record that better supported it. Pet. at 3, 11-12, 22-23. Because ACC does not seek review of the D.C. Circuit's decision that the exemption contravenes the statute, any such suggestions are irrelevant here. In any event, the D.C. Circuit held that the SSM exemption was unlawful under *Chevron* Step 1, and a rule that is contrary to law cannot be saved from its unlawfulness by any amount of factual support in an agency record. *See Chevron*, 467 U.S. at 842-843 (court and agency alike "must give effect to the unambiguously expressed intent of Congress"); EPA Response to Reh'g Pet. at 6-7 (acknowledging that because panel held SSM exemption unlawful under *Chevron* Step 1, further explanation of it would be pointless). Further, because the agency received repeated comments on the unlawfulness of its SSM exemption during its rulemakings to undo the SSM plan requirements, the agency had ample opportunity to address comments on this issue. Pet. App. at 5a-7a. *See supra* at 6.

precedent for constructive reopening. Pet. of Respondent-Intervenors for Reh'g and Reh'g En Banc ("Reh'g Pet.") at 7-9. On the merits, ACC argued that the general duty was a work practice standard under § 112(h) and therefore satisfied the Clean Air Act's requirement for continuous § 112-compliant standards. *Id.* at 10-11.[4] ACC also argued that the D.C. Circuit's decision would have dire practical effects for industry. *Id.* at 3-4, 22-25.

EPA did not seek rehearing, and opposed ACC's petition, stating "the Panel's analysis of its jurisdiction does not conflict with *Kennecott*, and thus does not meet the standards for rehearing en banc." EPA Response to Reh'g Pet. at 5. EPA also refuted ACC's claim on the merits that the general duty was a § 112(h) standard, agreeing with the Court's finding that "EPA has not purported to act under section 112(h)." *Id.* at 5 (quoting Pet. App. at 15a). In addition, EPA refuted ACC's claims of "dire consequences" from the ruling. It pointed out, among other things, that the agency has long implemented significant air pollution control programs – including the nationwide State Implementation Plan (SIP) program – without a blanket SSM exemption and without disruptive effects. *Id.* at 7-10.

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[4] Citing the dissent, ACC incorrectly claims the question of whether the general duty is an emission standard was not briefed below. Pet. at 11-12 (*quoting* Pet. App. at 20a-21a). The issue was fully briefed. SC Br. at 24-25, 24 n6, 25 n7; EPA Br. at 32-34 & 33 n5; SC Reply at 2-3.

The D.C. Circuit denied ACC's petition for rehearing en banc by a 5-3 vote.

REASONS WHY THE PETITION SHOULD BE DENIED

The petition for certiorari should be denied. ACC never raised its current argument that constructive reopening is impermissible below, either before the Panel or in its petition for rehearing en banc, and the D.C. Circuit has never addressed that argument in the present case or any other. The reasons underlying this Court's normal practice of declining to decide issues that were not raised or addressed below apply with particular force here, where ACC seeks to overturn longstanding and unbroken D.C Circuit precedent with respect to an issue on which that court has developed unique and extensive expertise.

Nor would there be a basis for review even if the issue had been raised below and passed on by the court of appeals. Contrary to ACC's claims, the decision below is entirely consistent with D.C. Circuit precedent, and does not conflict with any decision of any other lower court. Further, because ACC does not dispute that Clean Air Act regulatory provisions can be reopened for judicial review by agency action, its claim that they cannot be reopened in the specific circumstances addressed by the D.C. Circuit's constructive reopening precedent – *i.e.*, where the operation and effect of a regulatory provision is changed by an agency's subsequent retraction or overhaul of interlinked provisions – boils down to a fact-bound dispute with the D.C.

Circuit over which circumstances suffice to effect a reopening.

Nor does the opinion have the far-reaching effects that might militate in favor of review by this Court even in the absence of a true inter-circuit division of authority. The decision below does nothing to change longstanding D.C. Circuit precedent on constructive reopening, and cases involving that issue arise very rarely. The D.C. Circuit has found constructive reopening of rules only two times in the fourteen years since it recognized the concept in *Kennecott*, and no reported cases from other courts even address the issue. ACC's claims that the decision has adverse practical effects on its members merely reflect dissatisfaction with the Clean Air Act as written and are, in any event, without any factual basis.

I. THE QUESTION PRESENTED WAS NOT RAISED OR ADDRESSED BELOW.

ACC seeks certiorari to argue that a Clean Air Act rule can never be constructively reopened. Pet. App. at i, 13-14. In the briefing below, however, no party raised any such argument. Nor did ACC or any other party present such an argument by petition for rehearing. To the contrary, both ACC and EPA merely claimed in their merits briefs that the agency's actions did not suffice under the D.C. Circuit's case law to constructively reopen the SSM

exemption. Int. Br. at 17-18; EPA Br. at 23-27.[5] Indeed, ACC expressly acknowledged, in both its merits brief and in its rehearing petition, that rules can be constructively reopened. Int. Br. at 17-18 (*citing Envtl. Def.*, 467 F.3d at 1334); Reh'g Pet. at 7-8 (D.C. Circuit could review SSM exemption "if EPA had constructively reopened the exemption under *Kennecott*"). Not surprisingly, the D.C. Circuit panel did not address ACC's current argument that constructive reopening is unlawful. Addressing only the arguments actually before it, the D.C. Circuit explained that, based on the specific record before it, EPA had constructively reopened the SSM exemption to comment and judicial review in the particular circumstances here. Pet. App. at 10a-13a.

"This Court ... is one of final review, 'not of first view.'" *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1819 (2009) (*quoting Cutter v. Wilkinson*, 544 U.S. 709, 718 n7 (2005)). "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195,

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[5] In response to an alternative argument that the D.C. Circuit did not reach, EPA argued that administrative petitions are necessary where a party seeks review of an existing rule that "EPA has not reopened" based on its "substantive legal defects." EPA Br. at 27-28 (emphasis added). *See also* Int. Br. at 18 n3 (same). *Cf.* SC Br. at 30 ("even if EPA had not reopened the SSM exemption, this Court could still review it..."). No party, however, claimed that administrative petitions are necessary where a rule is reopened, either constructively or otherwise. *Compare* SC Br. at 29-30 (addressing reopening); EPA Br. at 23-27 (responding to reopening argument); Int. Br. at 12 18 (same).

200 (1927). *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) ("We ordinarily do not decide issues in the first instance not decided below.") (internal quotation marks and citation omitted); *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

In this case, the reasons for adhering to this Court's normal practice are especially strong. The sole argument that ACC seeks to advance before this Court – that constructive reopening is impermissible – was neither raised nor addressed below. Further, the contentions ACC now raises – *e.g.*, that the panel's ruling on reopening "unravels the regular ordering of the administrative process" (Pet. 16) and that the decision conflicts with decisions of other circuits (Pet. 17-20) and with other decisions of the D.C. Circuit itself (Pet. 21-22) – are the prototypical grounds for seeking en banc review. Moreover, Congress expressly committed review of all nationally applicable Clean Air Act rules to the D.C. Circuit, 42 U.S.C § 7607(b)(1), and that court is uniquely well positioned to evaluate claims about its own longstanding precedent concerning the appropriate grounds for reopening under CAA § 307(b) and similar provisions as well as the broader implications of alternative rules for administrative law.

ACC's failure to present its current argument to the D.C. Circuit and the fact that the D.C. Circuit has never addressed or even had the opportunity to address that argument call for denial of ACC's petition for certiorari. *See Webster v. Cooper*, 130 S.Ct. 456, 457 (2009) (Scalia, J., dissenting from order vacating and remanding case) ("Since [petitioner] did not argue that ground to the Court of Appeals, and since that court did not address it, we would almost certainly deny certiorari. *See* Adarand *Constructors, Inc. v. Mineta*, 534 U.S. 103, 108-109 (2001) (*per curiam*) (dismissing a writ as improvidently granted because the question at issue was not raised or considered below)."); Robert L. Stern, *et al.*, Supreme Court Practice 459-60 (8th ed. 2002) (demonstration that issue was not raised or decided below is "ordinarily fatal to the petition").

II. THE ISSUE PRESENTED DOES NOT MERIT REVIEW BY THIS COURT.

A. The Case Below Does Not Create A Circuit Split.

1. The Decision Below Is Consistent With Other D.C. Circuit Decisions.

It is undisputed that Sierra Club timely filed petitions for review of all three of EPA's rules that revised its regulations containing the SSM exemption and that Sierra Club repeatedly objected to the SSM exemption during the public comment periods for those rules. The D.C. Circuit made clear that the SSM exemption, the general duty, and the rescinded SSM plan requirements were inextricably linked and that EPA's revisions to the SSM plan

requirements changed the SSM exemption's operation and significantly increased its adverse impacts for Sierra Club members and other people living in communities located near major sources of hazardous air pollutants. Pet. App. at 10a-13a. ACC does not challenge these conclusions. In short, it is now undisputed that the present case met all of the requirements for constructive reopening under longstanding D.C. Circuit precedent.

Although ACC does not ask this Court to review the lower court's ruling on this score, it nonetheless devotes considerable portions of its petition to arguing either that the D.C. Circuit is divided with respect to the permissibility of constructive reopening or that the decision below is inconsistent with D.C. Circuit precedent. Pet. at 11-12, 15-16, 17-22. Those contentions, which hardly support review by this Court, are in any event wrong. The D.C. Circuit has consistently held that a rule can be reopened when an agency significantly changes the effect of a regulatory provision by making subsequent changes to closely interrelated provisions. *Kennecott*, 88 F.3d at 1214, 1226-1227. *See also Nat'l Ass'n of Mfrs. v. EPA*, 134 F.3d 1095, 1104-1105 (D.C. Cir. 1998) ("NAM") (granting reopening claim); *Environmental Defense v. EPA*, 467 F.3d 1329, 1333-1334 (D.C. Cir. 2006) (rejecting reopening claim); *Sierra Club v. EPA*, Pet. App. at 8a-13a (granting reopening claim); *NRDC v. EPA*,

571 F.3d 1245, 1265-1266 (D.C. Cir. 2009) (rejecting reopening claim). [6]

Kennecott, for example, addressed a 1986 regulatory provision authorizing State officials to recover, from companies that had discharged oil or hazardous substances into navigable waters, the value of services lost to the public when those impaired waters were restored. 88 F.3d at 1226. In 1994, without changing that provision, the Department of the Interior (DOI) amended interrelated provisions in a way that "expanded the remedies for lost use values." *Id.* The D.C. Circuit found that by substantially changing the extent to which lost use values could be recovered, DOI reopened its decision to allow them to be recovered at all. *Id.* at 1226-1227.

Similarly, *NAM* found that DOI had constructively reopened provisions in a 1987 regulation under the Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA) when it significantly changed related provisions in 1996. 134 F.3d at 1099-1100, 1103-1104. The 1987 regulations authorized the use of certain computer models to determine the amount of money that potentially responsible parties would be

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[6] Even before *Kennecott*, the D.C. Circuit noted that "[w]hile a petition from an agency order cannot be filed after the statutory period for filing has run, it may be that some of the issues that might have been raised in that appeal are so inextricably linked to a subsequent agency opinion on another aspect of the same case, that those issues may be raised in a timely appeal from the second opinion." *Cities of Batavia v. FERC*, 672 F.2d 64, 72 n15 (D.C. Cir. 1982).

assessed for natural resource damages. *Id.* at 1101-1102. The 1996 rule did not change the models, but significantly expanded the circumstances to which they could be applied. *Id.* at 1104. DOI's change to the regulatory context for the models reopened to challenge the predictive validity of the models themselves. *Id.* at 1105.

The D.C. Circuit carefully explained that the instant case fit within *Kennecott* and its other constructive reopening decisions. Pet. App. at 9a-13a. ACC does not challenge that determination here, and EPA has agreed that the reopening decision was fully consistent with D.C. Circuit precedent. EPA Response to Reh'g Pet. at 5.

2. There Is No "Intra-Circuit Conflict."

Even though no judge on the D.C. Circuit or any other court has ever heard ACC's current argument that constructive reopening is categorically impermissible, ACC implies that Judge Randolph and the three D.C. Circuit judges who voted to rehear the case below have endorsed it. Pet. at 11-12, 15-16. ACC further claims that the D.C. Circuit's constructive reopening decisions conflict with a separate line of cases allowing agency rules to be challenged outside of statutory review periods

following an administrative petition process. *Id.* at 17-22.[7]

An intra-circuit split is, as ACC appears to recognize (Pet at 21), normally a matter for resolution by the court of appeals, not this Court. *See* Sup. Ct. R. 10; *Davis v. United States*, 417 U.S. 333, 340 (1974). Indeed, a claim that two separate lines of decisions by a single court of appeals are in "conflict" is classic ground for the en banc procedure, *see, e.g.*, Fed. R. App. P. 35(a), and the usual rule that such claimed intra-circuit conflicts do not provide a basis for review by this Court applies with special force where the party seeking this Court's review failed to present the alleged intra-circuit conflict to the en banc court of appeals.

In any event, there is no merit to ACC's claim of "intra-circuit conflict," Pet. at 21. As noted above, the D.C. Circuit addressed constructive reopening claims on four occasions after its decision in *Kennecott* with different results depending on the specific evidence in the record before it. *See NAM*, 134 F.3d at 1104; *Environmental Defense*, 467 F.3d at 1333-1334; *NRDC*, 571 F.3d at 1265-1266; Pet.

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[7] The D.C. Circuit has held that this petition process is not available for rules subject to review under Clean Air Act § 307(b). *Amer. Rd. & Transp. Builders Ass'n v. EPA*, D.C. Cir. No. 08-1381 (December 11, 2009) ("*ARTBA*"), slip op. at 6-9, *pet'n for reh'g and reh'g en banc filed* (January 25, 2010). *See also National Mining Ass'n v. DOI*, 70 F.3d 1345, 1350, 1352 (D.C. Cir. 1995) (same holding under similar judicial review provision in Surface Mining Control and Reclamation Act). *Compare* Pet. At 15 (*citing* Pet. App. at 20a (Randolph, J., dissenting)).

App. at 9a-13a (decision below). On no occasion has any panel or individual judge even suggested that constructive reopening is categorically improper. Although Judge Randolph dissented below, he did not object to the doctrine generally, as ACC suggests (Pet. at 11-12, 15-16), but would have found only that it did not apply to the facts of the present case.

Nor is there "tension," as ACC claims (Pet. at 21-22), between the D.C. Circuit's reopening cases and its cases requiring administrative petitions in Clean Air Act challenges based solely on grounds arising after the sixtieth day or on claims that an existing regulation violates a statute. Rather, as the D.C. Circuit has made clear repeatedly, judicial review based on an agency's own actions reopening a rule is clearly distinct from judicial review based on an outside party's claim that the rule is either unlawful or subject to challenge on newly arising grounds. *Kennecott*, for example, explains that administrative petitions are generally required where a party challenges a rule after the statutory time period has passed based on a claim that is "violative of statute" but that they are not required where the agency itself has reopened the rule. 88 F.3d at 1213-1214. *See also Public Citizen v. NRC*, 901 F.2d 147, 150-153 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 992 (1990) (contrasting petition process and reopening). Similarly, although administrative petitions are a prerequisite under Clean Air Act § 307(b)(1)'s provision for challenges "based solely on grounds arising after such sixtieth day," 42 U.S.C. § 7607(b)(1), *see Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975), the D.C. Circuit has described that process as a "different

route" to judicial review than reopening, *Columbia Falls Aluminum v. EPA*, 139 F.3d 914, 920-921 (D.C. Cir. 1998). The D.C. Circuit has never required administrative petitions in reopening cases and, indeed, there is no need for them; reopening claims reach court only after a rulemaking process in which interested parties present their objections and the agency has a chance to respond. *See supra* at 6.

3. There Is No Inter-Circuit Split.

ACC's attempt to conjure up a split between the D.C. Circuit and other circuits (Pet. at 17-22) is equally without merit. By ACC's own description, *Dunn-McCampbell Royalty Interest v. Nat'l Park Service*, 112 F.3d 1283 (5th Cir. 1997), *Wind River Mining Corp. v. U.S.*, 946 F.2d 710 (9th Cir. 1991) and *Legal Envtl. Assistance Found. v. U.S EPA*, 118 F.3d 1467 (11th Cir. 1997), all involved claims that a longstanding agency action, unmodified by intervening agency action, was violative of statute. Pet. at 17-20. *Cf. Kennecott*, 88 F.3d at 1213. Also irrelevant are *Union Electric Co. v. EPA*, 515 F.2d 206 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976) and *Save The Bay v. EPA*, 556 F.2d 1282 (5th Cir. 1977) (cited in Pet. at 20-22), as these were "new information" cases. *Cf. Oljato*, 515 F.2d at 665-666. *See also Columbia Falls Aluminum*, 138 F.3d at 920-921 (explaining difference between review based on agency reopening and on new information); *Public Citizen*, 901 F.2d at 150-153 (separately addressing review based on reopening and on claim that existing regulation is "violative of statute").

Notably, none of the allegedly conflicting opinions from other circuits even mentions the D.C. Circuit

precedents on reopening, and none of the D.C. Circuit's reopening decisions addresses the cases ACC now claims are inconsistent with them. In short, the cases on which ACC seeks to rely do not even speak to – far less conflict with – the D.C. Circuit's reopening decisions.

B. The Issue Presented By ACC Is Fact-Bound and Case-Specific.

Even if the absence of a circuit split or even an "intra-circuit split" could be overlooked, the Clean Air Act argument that ACC now seeks to raise for the first time in this Court (Pet. at 12-15) does not have any of the broad statutory and jurisdictional implications that ACC claims. In reality ACC's argument boils down to a fact-bound and case-specific dispute with the D.C. Circuit over which agency actions suffice to reopen an existing regulatory provision.

Clean Air Act § 307(b)(1) broadly authorizes judicial review of "any" final action by EPA, 42 U.S.C. § 7607(b)(1), and the D.C. Circuit has long recognized that "the period for seeking judicial review may be made to run anew when the agency in question by some new promulgation creates the opportunity for renewed comment and objection." *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988), *cert. denied sub nom. Nuclear Management and Resources Council v. Public Citizen*, 498 U.S. 992 (1990) (*citing Montana v. Clark*, 749 F.2d 740, 743-744 (D.C. Cir. 1984) *cert. denied sub nom Montana v.*

Hodel, 474 U.S. 919 (1985)).[8] ACC does not dispute that regulatory provisions can be reopened by agency action and that Clean Air Act § 307(b)(1) authorizes judicial review of reopened rules. Thus, the issue presented by ACC's petition is not whether a Clean Air Act rule can be reopened for judicial review, but whether the circumstances in a given case suffice to effect a reopening.

Whether a rule has been reopened is a fact-bound issue that the D.C. Circuit has always resolved case by case based on the whole administrative record. *CTIA*, 466 F.3d at110 (*quoting NARPO*, 158 F.3d at 141 (*quoting Public Citizen*, 901 F.2d at 150)). *See also Public Citizen*, 901 F.2d at 150 ("[T]he general principle [is] that if the agency has opened the issue up anew, even though not explicitly, its renewed adherence is substantively reviewable.") (*quoting Ass'n of American Railroads*, 846 F.2d at 1473). This is equally true whether an agency "creates the opportunity for renewed comment and objection," *Ohio*, 838 F.2d at 1328, by changing a regulatory provision directly or by changing its operation and effect on regulated entities or the public through major alterations to "inextricably linked" provisions,

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[8] *See generally P & V Enterprises v. U.S. Army Corp of Engineers*, 516 F.3d 1021, 1023-1024 (D.C. Cir. 2008); *CTIA – The Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) ("CTIA"); *National Ass'n of Reversionary Property Owners v. STB*, 158 F.3d 135, 141 (D.C. Cir. 1998) ("*NARPO*"); *Kennecott*, 88 F.3d at 1214; *Edison Electric Co. v. EPA*, 996 F.2d 326, 331-332 (D.C. Cir. 1993); *Public Citizen*, 901 F.2d at 150; *Ass'n of American Railroads v. ICC*, 846 F.2d 1465, 1473 (D.C. Cir. 1988).

Pet. App. at 12a. Indeed, the D.C. Circuit has expressly held that constructive reopening is a type of reopening "within the broader meaning of *Ohio*." *Kennecott*, 88 F.3d at 1227. *See Environmental Defense*, 467 F.3d at 1333-1334 (court bases reopening decision on specific evidence in record before it).

Although ACC repeatedly claims that its argument is based on the Clean Air Act's "text," Pet. at 12-14, ACC does not identify any textual basis for distinguishing reopening of a regulatory provision based on subsequent changes to inextricably linked provisions from other types of reopening that ACC does not challenge. Nor does ACC suggest any way that this Court or any other court could determine when a reopening has occurred, other than on the case-specific and fact-specific basis that the D.C. Circuit has employed for decades. In short, the argument ACC advances is not a textual or statutory argument at all, but a challenge to the D.C. Circuit's resolution of a highly fact-bound issue that is presented differently in the context of each individual agency action. For this reason as well, it would not warrant review by this Court even had the question been duly raised below.

ACC also asserts the D.C. Circuit "acknowledged" that EPA did not reopen the SSM exemption. Pet. at 10. To the contrary, the D.C. Circuit held that EPA constructively reopened the SSM exemption (Pet. App. at 12a-13a), and then went on to review the SSM exemption on its merits (*id.* at 13a-17a) – something the Court would not have done absent a conclusion that EPA's actions had reopened the

exemption. *See, e.g.*, *Kennecott*, 88 F.3d at 1220-1221 (declining to review regulatory provision that was not reopened). Although the Court uses the terms "actual" and "constructive" to refer to different ways that an agency can create a "renewed opportunity for comment and objection" under *Ohio*, 838 F.2d at 1238, it has never suggested that these terms dictate any categorical difference with respect to whether a rule has been reopened for judicial review.[9]

Far from relying on the "subjective" perceptions of a party alleging that a rule has been reopened (Amicus Br. at 7-10), the D.C Circuit has always rigorously examined the administrative record in each case to determine whether and to what extent the operation of the challenged regulatory provision has been changed by subsequent revisions to interrelated provisions. Thus, in *Environmental Defense*, the D.C. Circuit rejected a claim based only on the petitioner's "own interpretation" and "understanding," unequivocally holding "[w]e require evidence." 467 F.3d at 1334 (emphasis in original). In *NRDC*, the D.C. Circuit rejected a reopening claim where the Court found EPA's

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[9] Contrary to ACC's claim (at 10), the conduct that the D.C. Circuit described as "not tantamount to *actual* reopening" was not the conduct that reopened the SSM exemption—i.e. EPA's retraction of the SSM plan requirements—but EPA's refusal to address unsolicited comment. Pet. App. at 9a (emphasis in original). In explaining that "such conduct" does not reopen a rule, D.C. Circuit simply noted a longstanding principle that "when the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review." *Id.* (*quoting Kennecott*, 88 F.3d at 1213).

revisions did not work a "sea change" on the challenged provision. 571 F.3d at 1266. Conversely, in the only cases where the D.C. Circuit granted constructive reopening claims, it based its decision on strong record evidence of a major change to "inextricably linked" provisions that substantially altered the operation and effect of the reopened provision. Pet. App. at 12a. Here, EPA "eliminated the only effective constraints that EPA originally placed on the SSM exemption." *Id.* at 11a. By changing the requirements that governed sources' operation during the periods when the SSM exemption applied, EPA changed the operation and effect of the exemption itself. *See supra* at 17-18 (discussing reopening holdings in *Kennecott* and *NAM*).

C. ACC's Claims Of Legal Or Practical Significance Are Groundless.

1. The Decision Below Does Not Alter Existing Law, Threaten The Finality Of Agency Actions, Or Unravel Notice And Comment Rulemaking Procedures.

Contrary to ACC's assertions (Pet. at 2-3, 15, 16-17), the ruling below does nothing to alter existing law on the reopening of rules, nor will it open the floodgates to late challenges of agency actions, or unravel the normal notice-and-comment rulemaking process.

It is undisputed that the holding below was fully consistent with *Kennecott* and the D.C. Circuit's other prior constructive reopening decisions. *Kennecott* scarcely opened floodgates to cases of any

kind. Since *Kennecott* was decided in 1996, only four reported claims of constructive reopening have come before the D.C. Circuit and only two of those were found to have merit. Nor did *Kennecott* unravel administrative rulemaking procedures, an event that – had it occurred – would doubtless have attracted some notice by the agencies or the courts in the years since *Kennecott* was decided. Having failed to challenge the D.C. Circuit's holding that the instant case fits within *Kennecott* (Pet. App. at 10a-12a), dispute EPA's identical conclusion (EPA Response to Reh'g Pet, at 4-5), or otherwise identify any distinction between *Kennecott* and the present case, ACC can hardly claim that the present case will have any effect that *Kennecott* did not have.

2. The Alleged Impact Of the Decision Below On ACC's Members Does Not Warrant This Court's Review.

ACC's last argument is that effects the decision below allegedly will have on industry make this the "unusual case" worthy of this Court's review due to its "practical consequences." Pet at 23-25. That argument is unfounded.

The effect ACC describes, that companies would no longer have a blanket exemption from compliance with emission standards during SSM, is not a "stark" consequence of the D.C. Circuit's decision but the intended operation of the Clean Air Act's plain language (as interpreted by the D.C. Circuit in a holding that ACC, tellingly, does not ask this Court to review). As the D.C. Circuit explained, Congress gave EPA discretion to set different standards for different "classes, types, and sizes of sources" and to

set section § 112(h) work practice standards in lieu of § 112(d) emission standards in specific situations, but it neither provided an SSM exemption nor gave EPA discretion to provide one. Pet. App. at 16a. *See Whitman v. American Trucking Associations*, 531 U.S. 457, 485 (2001) (statutory limits on agency discretion must be given effect). *See also NRDC v. EPA*, 859 F.2d 156, 208-209 (D.C. Cir. 1988) (explaining that it is well within Congress's authority to require not-to-be-exceeded standards even where those standards reflect the use of fallible control technology).[10]

In any event, as EPA has already demonstrated, ACC's claims of "stark" consequences from the D.C. Circuit's decision, Pet. at 3-4, 22-25, have no basis in fact. *See* EPA Response to Reh'g Pet. at 9; EPA Letter at 2-4. The "majority" of EPA's rules under Clean Air Act § 112 "include specific regulatory text that exempts or excuses compliance during SSM events, and such text is in addition to, or in lieu of" a cross reference to the vacated SSM exemption. EPA Letter at 2. Even for those rules that do not include an SSM exemption other than the one vacated by the decision below, EPA's initial evaluation – which the agency has not changed – "indicates that most of these rules should not present compliance issues for

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[10] Although the Clean Air Act does not allow EPA to excuse violations by providing a blanket exemption from compliance with emission standards at the liability stage, it expressly requires both EPA and the courts to consider sources' "good faith efforts to comply" in determining what penalty, if any, should be assessed for violating emission standards. 42 U.S.C. § 7413(e)(1).

sources during SSM events." *Id.* at 3. And for any sources that are unable to comply with emission standards during SSM events, "EPA will determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during SSM periods ... and whether the source has developed and implemented an SSM plan to minimize such emissions." *Id.* *See* 42 U.S.C. § 7413(e)(1).[11]

To the extent the decision below indicates that the SSM exemptions still contained in other § 112 rules are unlawful, EPA can address those exemptions in a normal rulemaking process. EPA Letter at 4. Indeed, EPA could not alter those rules without notice and comment rulemaking, and ACC's members would have an opportunity to participate in any such rulemaking and to challenge the results in court. As ACC itself has noted, the D.C. Circuit did not hold that § 302(k) requires "unchanging" standards under § 112 and EPA has already proposed specific alternative standards to apply

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[11] ACC repeatedly suggests that EPA would have made its § 112 standards less stringent if the SSM exemption had not been in place. Pet. at 3-4, 12-13, 23-24. Although this Court need not address that issue, which can be resolved by EPA or by the D.C. Circuit if necessary, the notion that EPA would or could have set standards at a different level absent the SSM exemption is purely speculative. If ACC's members or other entities believe that vacatur of the SSM exemption warrants changes in the stringency of specific § 112 rules, they can seek revision of those rules under Clean Air Act § 307(b)(1). *See Oljato*, 515 F.2d at 666; *supra* at 20. Two industry groups have done so. *See The Aluminum Ass'n v. EPA*, D.C. Cir. No. 09-1303 (filed December 11, 2009); *Amer. Forest & Paper Ass'n v. EPA*, D.C. Cir. No. 09-1311 (filed December 15, 2009).

during startups and shutdowns for at least one industry. Reh'g Pet. at 13 & n. 6. Thus, if ACC believes that the standards contained in those rules should be less stringent if EPA removes the SSM exemption (*see* Pet. at 3-4, 12-13, 23-24), it can present that argument to EPA if and when the agency engages in a rulemaking to do so.

Finally, contrary to ACC's suggestion, it is neither novel nor unusual for EPA to require continuous compliance with emission standards and not provide a blanket SSM exemption. EPA's pre-1990 air toxics standards required compliance "at all times," and provided no SSM exemption. 59 Fed. Reg. 12408, 12423 (March 16, 1994), JA 148. *See* EPA Response to Reh'g Pet. at 7-8 Likewise, EPA requires continuous compliance with "best available control technology" (BACT) standards and has repeatedly rejected the type of blanket SSM exemption struck down in the decision below. *See* SC Br. at 27-28; EPA Response to Reh'g Pet. at 7-8. The technologies on which these standards are based are no more infallible than the technology used to comply with § 112 standards, but these programs have not produced any of the draconian results about which ACC speculates.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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